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No. 06-1321

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MYRNA GÓMEZ-PEREZ,

Petitioner,

v.

JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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INTRODUCTION AND SUMMARY OF ARGUMENT

As petitioner has shown, § 633a(a) of the Age Discrimination in Employment Act ("ADEA") clearly prohibits retaliation against older workers who complain that they were subjected to age discrimination. This plain meaning is both confirmed and compelled by the fact that the statute's text was copied virtually verbatim from Title VII's federal-sector discrimination ban, which prohibits retaliation; by this Court's construction of a materially indistinguishable discrimination ban in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005); and by the consistent interpretations of two enforcing agencies. In the face of this evidence, the government makes a fleeting "plain language" argument, then spends the bulk of its brief attempting to explain why "contextual" evidence shows that Congress intended to leave federal workers without a judicial remedy for retaliation caused by complaints of age discrimination. In fact, the government ignores or distorts the relevant context, and its reading leads to utterly incongruous results.

A. The contextual fact most critical to understanding § 633a(a) is that it was modeled directly on Title VII's federal-sector discrimination ban, § 717(a), which bars retaliation. By copying the language of § 717(a) into § 633a(a), Congress gave these two discrimination bans the same scope and meaning. The government cannot avoid this conclusion by pointing to irrelevant differences in the remedial schemes of these statute—*i.e.*, the fact that Title VII's private-sector remedies apply to violations of § 717(a), while the ADEA's private-sector remedies are not incorporated into § 633a. Nor is it relevant that § 633a(f) makes the ADEA's federal-sector provisions inde-

pendent of its private-sector provisions. Neither of these facts demonstrates that Congress intended the language of § 633a(a) to have a significantly different, and narrower, meaning than the nearly identical language of § 717(a) of Title VII.

Title VII also illustrates that Congress uses two different verbal formulations for banning retaliation—a general discrimination ban that bars all discriminatory acts, including retaliation, and a particularized enumeration of discriminatory acts that includes retaliation as one such act. In both instances, Congress bars retaliation. Moreover, if, as the government argues, § 633a(a) does not sweep as broadly as the ADEA's private-sector retaliation ban, this same discrepancy in coverage would arise under Title VII's private- and federal-sector provisions. Any such discrepancy, therefore, is hardly an anomaly in federal antidiscrimination law.

The real anomaly is that, under the government's reading, federal workers may sue for retaliation triggered by complaints of discrimination based on race, color, religion, sex, and national origin but not age. The government's speculation about workplace efficiency does not explain this unlikely and unfair distinction. Indeed, its reading renders federal discrimination laws as a whole irrational.

Moreover, the government's contextual arguments provide no basis for concluding that *Jackson*'s textual analysis is inapplicable here. Although Title IX involved an implied right of action, that did not give the *Jackson* Court "latitude" to expand the scope of Title IX's substantive ban. Thus, *Jackson*'s interpretation of Title IX is fully applicable to § 633a(a)'s materially indistinguishable discrimination ban, and confirms that the latter bars retaliation.

B. The fact that the ADEA's private-sector provisions expressly bar retaliation is not evidence that Congress intended to exclude such a prohibition from § 633a(a). The government's negative inference argument fails to account for the fundamental differences between the structure and wording of § 633a(a) (a general ban) and § 623 (an enumeration ban). *Jackson* explained that narrowing inferences cannot be based on comparisons of such disparate provisions, and the government's own cases show that this Court draws negative inferences from comparisons of nearly identical provisions. Moreover, as petitioner has shown, the government's negative inference theory leads to the plainly erroneous conclusion that the ADEA's federal-sector discrimination ban does not prohibit age-discriminatory job notices and advertisements because § 633a(a), unlike § 623(e), fails to mention such practices expressly. The government's failure to respond to this showing simply underscores the impropriety of narrowing § 633a(a)'s general discrimination ban based on an apples-to-oranges comparison with § 623's enumeration ban.

Section 633a(f), which provides that the ADEA's private- and federal-sector schemes are distinct, likewise cannot be used to narrow § 633a(a)'s broad scope. Section 633a(a)'s plain language and historical derivation demonstrate that it prohibits retaliation. Recognizing this does not "engraft" any ADEA private-sector provision onto § 633a, in contravention of § 633a(f).

C. The government hypothesizes that the kinds of concerns that lead this Court to decline to imply a cause of action for federal employees in *Bush* v. *Lucas*, 462 U.S. 367 (1983), may have prompted Congress to deny older workers protection from retaliation, and to hope instead that the Civil Service Com-

mission ("CSC") would extend administrative protections to fill the resulting void. Such speculation, however, cannot override the clear evidence from § 633a(a)'s text and historical origins that it bars retaliation. That speculation is also groundless.

Because the protections against retaliation in then-extant antidiscrimination regulations were based on Title VII, Congress could not have assumed that the CSC would extend such protection to age claims unless § 633a(a) itself barred retaliation. The 1978 Civil Service Reform Act ("CSRA") has no bearing on the 1974 Congress's intent when it adopted § 633a(a). And the government's reliance on the CSRA only makes its position more untenable. The government notes that the ADEA has been extended to congressional and certain presidential employees, and it argues, erroneously, that Congress supplemented the ADEA's protections for these employees with an express retaliation ban. Under the government's view, therefore, Congress chose to protect federal workers from retaliation triggered by complaints of all discrimination barred by Title VII, but chose, for age-based retaliation, to give some federal employees a complete judicial remedy, others a severely restricted administrative remedy, and still others no remedy at all. The government cites no evidence that Congress intended to address retaliation in such a crazy-quilt manner.

D. The interpretations of § 633a(a) by the agencies charged with its enforcement confirm that Congress barred age-based retaliation. In contending otherwise, the government ignores the substance of the CSC's initial regulations, and fails to discuss language in the current EEOC regulations that plainly construes § 633a(a) to bar retaliation.

E. Finally, the government's reliance on sovereign immunity is misplaced. Where Congress authorizes a cause of action against the federal government for violation of a statutory prohibition, rules of strict construction require courts to decide whether certain types of relief apply in an action brought to enforce § 633a(a)'s substantive norm, But those rules do not apply to the norm itself. The government identifies no case in which this Court has used sovereign immunity principles to narrow a substantive norm. Nor does it respond to petitioner's showing that the "double-narrowing" it seeks would lead to unexplained anomalies. In all events, § 633a(a)'s retaliation ban satisfies any clear statement rule.

ARGUMENT

A. The Plain Language And Historical Derivation Of § 633a(a) Show That It Bars Retaliation.

In her opening brief, petitioner demonstrated that § 633a(a) bars retaliation against an older worker because he complains of age discrimination. This is clear from the text of the statute, its derivation from Title VII's federal-sector discrimination ban, and this Court's interpretation of a materially indistinguishable provision in *Jackson*. The government fails to show otherwise.

1. The government claims that § 633a(a) only "prohibits discrimination based on the status" of an employee, not that person's conduct. Br. 9. But, when an employer retaliates because a worker complains of age discrimination, the retaliation is "based on" *both* the person's conduct (complaining about unlawful activity) *and* on "age." The retaliation is triggered not merely by the act of complaining, but by the nature of the complaint, which is directly tied to age. By con-

trast, if the same worker suffered retaliation after complaining of race discrimination, the employer's action would not be "based on age."

Thus, what the government calls the "most natural reading" of the statute, Br. 9, 14, is actually a revision of its text. On the government's view, § 633a(a) prohibits "discrimination based *solely* on an employee's status as an individual age 40 or over." But, Congress wrote a very different prohibition, broadly requiring that all personnel actions "shall be made free from *any* discrimination based on age." 29 U.S.C. § 633a(a) (emphasis added).

Indeed, Congress modeled this broad prohibition directly on § 717(a) of Title VII, *Lehman* v. *Nakshian*, 453 U.S. 156, 167 n.15 (1981), which proscribes retaliation. Congress made clear that § 717(a) prohibits retaliation clear by expressly including a private-sector remedy for reprisals among the remedies for violations of § 717(a). See Ptr. Br. 19-20. Moreover, as this Court has recognized, one of the reasons Congress adopted Title VII's federal-sector provisions was because it found that fear of retaliation had rendered earlier administrative protections against federal-sector discrimination ineffective. See *Brown* v. *GSA*, 425 U.S. 820, 825-26 (1976) (noting Congress's finding that federal employees did not invoke administrative remedies "'for fear that doing so will only result in antagonizing their supervisors and impairing any future hope of advancement'") (quoting S. Rep. No. 92-415, at 14 (1971)). The government itself effectively concedes that § 717(a) prohibits retaliation.[1]

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[1] The government attempts to limit its concession, Br. 39 n.11, but because § 633a(a) was modeled directly on § 717(a), the latter's scope is inescapably at issue here. Accordingly, to respond to petitioner's agument, the government had to show that

Because the language of § 717(a) is replicated *in haec verba* in § 633a(a), the two provisions have the same meaning, *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 120-21 (1985) (applying principle to other ADEA provisions copied from Title VII), absent "compelling evidence" to the contrary. *Communications Workers of Am.* v. *Beck*, 487 U.S. 735, 746, 754 (1988) (applying principle to "nearly identical" labor provisions). Thus, § 633a(a), like § 717(a) of Title VII, prohibits retaliation.[2] The government's "contextual" evidence does not remotely show that Congress intended § 633a(a) to be narrower than the Title VII ban from which it was derived.

In contending otherwise, the government deems it significant that Title VII's federal-sector remedial scheme incorporates Title VII's private-sector remedies, while the ADEA's federal-sector remedial scheme does not incorporate the ADEA's private-sector remedies. Br. 37-39. But it simply does not follow from this that § 717(a) bars retaliation while § 633a(a) does not. Title VII's remedial scheme merely makes clear (by incorporating a retaliation-related remedy) that § 717(a) bars retaliation. The incorporation of this private-sector retaliation remedy, however, did not *add* retaliation to § 717(a)'s substantive scope—that proscription was already there, in § 717(a)'s broadly worded general discrimination ban. By using § 717(a)'s language to outlaw federal-sector age discrimination, Congress necessarily incorporated this same meaning into § 633a(a). The fact that Congress authorized "such legal or equi-

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§ 717(a) does not encompass retaliation. The government did not.

[2] This conclusion is reinforced by the fact that the CSC had interpreted § 717(a) to bar retaliation before Congress copied its language in § 633a(a). Ptr. Br. 21-24. *See also infra* at 21-22.

table relief as will effectuate the purposes of" the ADEA's federal-sector prohibition, 29 U.S.C. § 633a(c), is plainly not evidence that Congress meant to exclude retaliation from § 633a(a). To the contrary, this language is identical to § 626(c), see *id.* § 626(c)(1), which authorizes relief in civil actions to enforce the ADEA's private-sector provisions, including the express ban on retaliation.[3]

Section 633a(f) likewise reveals no intent to exclude retaliation from § 633a(a). The addition of this provision in 1978 rendered § 633a(a) "self-contained and unaffected by other sections" of the ADEA. *Lehman*, 453 U.S. at 168. It did not change the meaning Congress had given § 633a(a) four years earlier by copying the language of § 717(a).

Title VII's federal-sector discrimination ban also refutes two of the government's other "plain language" arguments. First, § 717(a) shows that Congress does *not* invariably use the language found in § 623(d) of the ADEA and § 704(a) of Title VII to prohibit retaliation, as the government repeatedly claims. Br. 15-18. Instead, like § 633a(a), § 717(a) uses a general ban to prohibit retaliation. And, Title VII shows that it would not be anomalous for Congress to protect private but not federal employees from retaliation outside the workplace. *Id.* at 16. If § 633a(a)'s protection from retaliation is so limited—a question not presented here—then this is equally true of § 717(a), which is also limited to "personnel actions," 42 U.S.C.

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[3] By contrast, differences in *substantive* provisions led the Court to conclude that the ADEA's private-sector prohibitions are in certain respects narrower than Title VII's private-sector provisions. *Smith* v. *City of Jackson, Miss.*, 544 U.S. 228, 236 n.6, 240-41 (2005).

§ 2000e-16(a).[4] The fact that retaliation protections may not be exactly co-terminous in the private and federal sectors is thus not anomalous, and is certainly not evidence Congress intended to leave federal workers with no judicial remedy for *any* retaliation.

Indeed, it is the government's reading that creates anomalies. In light of Title VII's protections, the government's position is that Congress afforded federal workers a judicial remedy for retaliation triggered by complaints of discrimination based on race, color, religion, sex, and national origin but *not* age. The government cites no evidence, textual or otherwise, that Congress intended to single out older workers for such disfavored treatment.

2. Section 633a(a)'s plain meaning is also confirmed by this Court's determination that Title IX "clearly prohibit[s] retaliation for complaints about" unlawful discrimination. *Jackson*, 544 U.S. at 178 n.2. The Court "reach[ed] this result based on [Title IX's] *text*," *id.* at 178 (emphasis added), which is materially indistinguishable from (and indeed, in some respects narrower than) the text of § 633a(a). The government does not—and cannot—identify any textual differences in the substantive prohibitions of

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[4] Arguably, because § 704(a) reaches retaliation outside work, *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006), the incorporation of remedies for violations of § 704(a) in Title VII's federal-sector remedial provisions shows that § 717(a) also bars non-workplace retaliation. If so, for the reasons discussed above, § 633a(a) would include the same protection. Nor is it clear that the government is correct in arguing that § 633a(a) does not bar retaliation against younger workers. Br. 15. Retaliation against a 35-year old employee who corroborates a 60-year old's age discrimination claim would "affect" older workers by deterring others from testifying on behalf of other workers who complain of age discrimination.

§ 633a(a) and Title IX that explain why the latter bars retaliation, but the former does not.

Instead, having argued that the plain language of Title IX prohibits retaliation,[5] the government now contends, in effect, that the Court distorted the statute's meaning due to policy concerns. It claims the Court exercised "latitude" it possesses when shaping a remedial scheme for an implied cause of action to ensure that Title IX's enforcement scheme did not unravel. Br. 23. This claim is meritless.

This Court cited concerns over the efficacy of Title IX's enforcement scheme in a separate part of its opinion addressing *who* could bring a retaliation claim, not whether Title IX barred retaliation *vel non*. *Jackson*, 544 U.S. at 180-81. More fundamentally, while courts have latitude to shape *remedies* under statutes enforced through implied rights of action, they cannot alter the *substantive prohibitions* of such statutes. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994) (in implied right of action, "the text of the statute controls" where the issue is "the scope of conduct prohibited").[6] *Jackson* simply interpreted the scope of

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[5] Brief of the United States as *Amicus Curiae* Supporting Petitioner at 5, 8-9, in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005) ("U.S. *Jackson* Br."). The government's qualification that "a general nondiscrimination provision does not *invariably* encompass" retaliation because "[o]ther relevant indicators of statutory intent *could* show that retaliation is *categorically excluded*," *id.* at 10 n.1 (emphases added), confirms that broad discrimination bans *do* prohibit retaliation, absent affirmative evidence to the contrary—evidence that does not exist here.

[6] In *Gebser* v. *Lago Vista Independent School District*, 524 U.S. 274 (1998), the school district conceded Title IX had been violated. *Id.* at 298 n.7 (Stevens, J., dissenting) (citing respon-

Title IX's substantive proscription, and its textual analysis is fully applicable here.[7]

In short, the plain language of § 633a(a), the historical derivation of that language, and this Court's decision in *Jackson* confirm that § 633a(a) prohibits retaliation.

B. The Government's "Contextual" Arguments Provide No Justification For Narrowing § 633a(a)'s Scope.

1. The government principally argues that the explicit bar on retaliation in § 623(d) demonstrates that Congress chose not to prohibit retaliation in the federal sector. Br. 9-11, 16-19, 22-23, 25-26. This "negative inference" theory, however, ignores the fundamentally different structures of the ADEA's private- and federal-sector prohibitions, and thus rests on a logical fallacy. A strong inference that § 633a(a) does not prohibit retaliation would arise if Congress had modeled § 633a(a) on *§ 623(a)*, then failed to include any federal-sector analogue to § 623(d). But no such inference can be drawn here, where Congress chose

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dent's brief). The Court exercised its "latitude" not to alter the scope of the statute's prohibition, but to deny a damages remedy where school officials lacked notice of the violation. *Id.* at 284-90.

[7] The Court bolstered that textual analysis by observing that it was proper to presume that the 1972 Congress that enacted Title IX was aware of how this Court had construed 42 U.S.C. § 1982 in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and would have expected Title IX's discrimination ban to be interpreted in the same manner. *See Jackson*, 544 U.S. at 176-77. That same presumption applies here. Because substantive prohibitions are interpreted in the same manner regardless of how they are judicially enforced, the 1974 Congress would have expected § 633a(a)'s substantive to be given the same broad scope as § 1982's comparable ban, even though the latter is enforced through an implied cause of action.

instead to outlaw federal-sector age discrimination using a general discrimination ban, rather than the detailed enumeration ban it used for the private sector.

Indeed, in *Jackson*, the government itself recognized the structural differences between Title VII's private-sector provisions, which set forth "a series of prohibitions . . . that specify in great detail the kind of discrimination prohibited," and Title IX's "single general prohibition." U.S. *Jackson* Br. 21. The government explained that Congress's decision to include an express retaliation ban in Title VII but not Title IX did *not* demonstrate that Title IX failed to bar retaliation. *Id.* This Court agreed. In words equally applicable to § 633a(a), it ruled that, "[b]ecause Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered." *Jackson*, 544 U.S. at 175.

The government claims this case is different because it seeks to draw a negative inference by comparing "different provisions *within* a statute." Br. 22. But *Jackson* rejected the comparison of Title IX and Title VII's private-sector provisions not because it was *inter*-statutory, but because the statutes were fundamentally different in structure and wording. The same is true here: the ADEA's private-sector provisions "were derived *in haec verba* from" the Title VII private-employer provisions at issue in *Jackson*, see *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978), while § 633a(a), like Title IX, is a "broadly written general

prohibition on discrimination." *Jackson*, 544 U.S. at 175.[8]

The fact that Congress extended the ADEA's private-sector provisions to state but not federal employers, Br. 22, is equally irrelevant. This shows only that Congress intended to attack age discrimination in the federal sector using a different statutory regime. The scope of that separate regime depends on the language of § 633a(a), not on comparisons with the very different language Congress used to regulate state employers.

Nor does it matter that here, unlike *Jackson*, the government seeks to compare statutes with express causes of action. Br. 23. The Court noted in passing that Title IX, unlike Title VII, was enforced through an implied cause of action. *Jackson*, 544 U.S. at 175. But, in refusing to narrow Title IX's scope, the Court relied on the differences in the structure and wording of the substantive proscriptions of the two statutes, not their mode of judicial enforcement. See *id.* (refusing to draw inference from Title IX's failure to mention retaliation because it does "not list any specific discriminatory practices") (emphasis omitted).

The government again argues that discrimination bans are interpreted differently depending on whether they are enforced through an implied or an express cause of action. Br. 23-24. But, as noted above, this is flatly incorrect. Indeed, in *Jackson*, the

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[8] The government's "same statute" distinction is also at odds with its recognition that Congress intended "to separate" the ADEA's federal- and private-sector prohibitions by enacting a "self-contained provision governing federal-sector employment." Br. 9, 2; *see also id.* at 24-25. The ADEA's distinct, self-contained regimes for the private and federal sectors are functionally equivalent to two separate statutes.

Court explained that "Title IX's private right of action encompasses suits for retaliation, because retaliation falls within *the statute's prohibition of intentional discrimination*," *Jackson*, 544 U.S. at 178 (emphasis added)—not because the Court had "latitude" to decide what the statute's prohibition should cover. Thus, the Court's reasons for refusing to draw negative inferences based on a comparison of disparate statutes in *Jackson* are equally applicable here.

The cases the government cites to support its negative-inference theory demonstrate why it is inapplicable. The Court drew negative inferences in *Russello* v. *United States*, 464 U.S. 16 (1983), and *Rodriguez* v. *United States*, 480 U.S. 522 (1987), based on disparities in otherwise nearly *identical* provisions.[9] And the Court did the same thing in *Lehman*. Comparing § 7(c) and § 15(c) of the ADEA, which authorize suits by private and federal workers, respectively, the Court observed that, "[w]ith the exception of the express right to jury trial conferred by § 7(c)(2) and of the proviso in § 7(c)(1), *§ 7(c) is identical to § 15(c)*." *Lehman*, 453 U.S. at 158 n.6 (emphasis added). Contrary to the government's contention, Br. 19 n.2, this observation was central to the Court's rationale. It was the fact that "[s]ection 15 *contrasts* with § 7(c) of the Act" that "demonstrated that [Congress] knew how to provide a statutory right to a jury trial when

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[9] *See Russello*, 464 U.S. at 23 (forfeitures not limited to interests in an "enterprise" because another subsection referred to an interest in . . . *any enterprise*," while forfeiture provision referred to "any interest" acquired in violation of the statute) (emphasis added); *Rodriguez*, 480 U.S. at 525 (statute mandating minimum additional sentence for certain felonies did not supersede authority to suspend execution of sentences because statute expressly overrode suspension authority in other specified situations).

it wished to do so," *Lehman*, 453 U.S. at 162 (emphasis added), and that "contrast" lay in the differences between the otherwise identical terms of § 7(c) and § 15(c). Nothing in *Lehman* supports drawing a negative inference here, where the structure of the provisions at issue differ so radically.[10]

Finally, under the government's misguided analysis, the fact that § 623 expressly bars age-discriminatory job notices is "overwhelming" evidence, Br. 24 n.4, that Congress excluded such a ban from § 633a(a). But this is plainly wrong. As petititoner has shown, such a prohibition is superfluous in light of § 633a(a)'s broad language. Ptr. Br. 42. This same logic, which the government fails to dispute, demonstrates that Congress did not list retaliation in § 633a(a)'s general prohibition because such a prohibition was also superfluous, not because Congress meant to exclude such a prohibition.

2. Section § 633a(f) is equally irrelevant. The government argues that, because this provision renders § 633a self-contained, it is improper to "engraft" or "import[]" a "new substantive cause of action" into § 633a. Br. 25. But, recognizing that § 633a(a)'s general discrimination ban prohibits reprisals or discriminatory job notices does not import any of the ADEA's private-sector provisions into § 633a; it simply gives effect to the broad age-discrimination ban Congress adopted for the federal sector.

Nor do the "origins" of § 633a(a) or the 1974 amendments to the Fair Labor Standards Act ("FLSA")

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[10] Nor does *Burlington Northern* support such a conclusion. There, the Court relied on differences in equally detailed provisions that are part of the same private-sector regime to conclude that § 704(a) reached conduct outside the workplace. 126 S. Ct. at 2411-12.

show that Congress excluded retaliation from § 633a(a). The government argues that, because Congress subjected states but not the federal government to the ADEA's private-sector provisions in 1974, that same Congress was "undoubtedly aware" that § 633a "did not include text similar to the prohibition on retaliation in Section 623(d)." Br. 25-26. Similarly, the government contends that Congress's decision that same year to subject the federal government to the FLSA, which includes an express retaliation ban, is supposedly "another indication that Congress did not want to" protect older federal employees from retaliation. *Id.* at 26-27.

But these arguments ignore the fact that § 633a(a) is a general discrimination ban modeled on § 717(a) of Title VII. Congress was "undoubtedly aware" that § 717(a), enacted just two years earlier, prohibits retaliation, and that in *Sullivan*, decided just a few years earlier, this Court had construed another general discrimination ban to include retaliation. Once again, Congress's choice of a general rather than an enumeration ban is not evidence that it meant to deny protection from retaliation.[11]

C. The Government's Speculation Concerning Administrative Remedies Does Not Demonstrate That § 633a(a) Fails To Bar Retaliation.

The government's reliance on the manner in which Congress and the Executive Branch addressed re-

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[11] The FLSA is another enumeration statute, and its prohibitions (which establish minimum wages or maximum work hours) cannot possibly be understood to encompass retaliation. *See* 29 U.S.C. § 206 (minimum wages); *id.* § 207 (maximum hours). Thus, Congress had to ban retaliation expressly in the FLSA in order to outlaw such conduct.

taliation in federal employment is both misplaced and misleading. Indeed, its arguments rest on unsupported speculation about why Congress might have excluded retaliation from § 633a(a), not evidence that it actually did so, and lead to utterly implausible results.

The government does not dispute that, in 1974, general personnel regulations provided remedies only for "adverse actions," Ptr. Br. 27-28, which did not include the most common forms of retaliation. See Br. of the National Treasury Employees Union as *Amicus Curiae* 7-9 ("NTEU Br."). Nor does the government dispute that the revised antidiscrimination regulations the CSC issued in 1972, after Congress amended Title VII, did not apply to age discrimination. Ptr. Br. 26. Nevertheless, the government hypothesizes that Congress "reasonabl[y] expect[ed]" the CSC to extend these regulations, and their antiretaliation protections, to complaints of age discrimination, Br. 33. Quoting extensively from *Bush* v. *Lucas*, 462 U.S. 367 (1983), the government urges the Court to "respect[]" this presumed judgment. Br. 29.

In stark contrast to *Bush*, however, the issue here is not whether the Court should *create* "new rights and remedies," *id.*, but whether Congress "categorically excluded" retaliation from a broadly worded general discrimination ban. U.S. *Jackson* Br. 10 n.1. Observations about what Congress "was entitled to consider" and guesses about what its actions "presumably reflect," Br. 29, 33, is not evidence of congressional intent at all. Such speculation, therefore, is plainly not compelling evidence that Congress intended § 633a(a)'s general prohibition to be significantly narrower than the Title VII model from which it was derived.

In fact, the government's musings are groundless. First, if § 633a(a) did not proscribe retaliation, the CSC would not have extended the antiretaliation protections of the then-extant antidiscrimination regulations to age-based retaliation. Those antiretaliation protections were based on Title VII. The CSC had revised those regulations in 1972 "to implement" the amendments to Title VII, 37 Fed. Reg. 22717 (Oct. 21, 1972), and it had adopted new antiretaliation protections only for discrimination claims, *id.* at 22,723 (§ 713.262),[12] which did not include discrimination based on age. See Ptr. Br. 26. Other reprisals could not be challenged unless they constituted "adverse actions." *Id.* at 27-28. Thus, because the antiretaliation protections of the antidiscrimination regulations were based on Title VII, which does not reach age discrimination, Congress could not have expected that the CSC would extend those protections to age-based retaliation unless § 633a(a) reached such conduct.

Second, the government's speculation is fatally undermined by its concession that Title VII's federal-sector discrimination ban prohibits retaliation. If concerns over "efficiency" led Congress to relegate age-based retaliation claims to an administrative process, why did it provide a judicial remedy for retaliation claims based on virtually all other types of discrimination? The government offers no explanation for such an arbitrary and unfair distinction, and

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[12] Previously, the antidiscrimination regulations, like the general personnel regulations, had simply provided that "the complainant shall be free from . . . reprisal," but provided no remedy. *See* 5 C.F.R. 713.214(b) (1972).

cites no evidence Congress intended to deny a judicial remedy only for age-based retaliation claims.[13]

Nothing in the CSRA shows that Congress intended such a bizarre scheme. Enacted in 1978, the CSRA sheds no light on the intent of the 1974 Congress. Nor was it related to the 1978 amendments to the ADEA, Br. 3-4, which were passed six months earlier.[14] The government cites nothing in the text or legislative history of either enactment to show that Congress intended the CSRA to codify the exclusive means of redrssing retaliation under the ADEA. Instead, Congress expressly preserved pre-existing remedies under the ADEA, including the right to sue in federal court. See 5 U.S.C. § 2302(d) (CSRA "shall not be construed to extinguish or lessen . . . any right or remedy available to any employee or applicant for employment in the civil service under . . . sections [631] and [633a] of the [ADEA]").

Indeed, reliance on the CSRA only heightens the incongruities of the government's position. The government does not dispute that, under the CSRA, employees lack control over whether most retaliatory acts can be challenged at all (and have no right to judicial review if they are not), NTEU Br. 14-20, or that many federal workers covered by the ADEA have no remedies under the CSRA, *id.* at 20-24. In addition, the government notes that the Congressional Accountability Act ("CAA") and the Presidential and

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[13] Moreover, bifurcating claims of age discrimination and retaliation is actually inefficient for the government. NTEU Br. 24-25.

[14] *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (passed April 6, 1978); Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (passed October 13, 1978).

Executive Office Accountability Act ("PEOAA") extended the ADEA's federal-sector protections to congressional employees and employees in the Executive Office of the President, 3 U.S.C. § 411(c)(1), which includes a host of sensitive policy-making positions. See, *e.g.*, 50 U.S.C. § 402(a), (c) (National Security Council and its staff). Moreover, the government contends, erroneously, that Congress chose to supplement the ADEA's protections for these employees with an express retaliation ban. Br. 36 n.10.[15] Thus, according to the government's mistaken view, Congress protected federal workers from retaliation triggered by complaints of discrimination barred by Title VII, but chose, for age-based retaliation, to give some workers (those covered by the CAA and PEOAA) a judicial remedy; others (covered by the CSRA) a severely restricted administrative remedy; and others

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[15] Contrary to the government suggestion, the provisions it cites from the CAA and PEOAA (3 U.S.C. § 417(a); 2 U.S.C. § 1317(a)) do not show that the ADEA generally fails to prohibit retaliation. These provisions made it unlawful to retaliate for the exercise of rights under *several* laws extended to such employees. *See* 2 U.S.C. § 1302(a) (listing laws); 3 U.S.C. § 402 (same). Most of these laws bar retaliation, either through a general ban, such as § 717(a) of Title VII and § 633a(a), or an express prohibition. *See, e.g.*, 29 U.S.C. § 2615 (Family Medical Leave Act). But at least one, the Worker Adjustment and Retraining Notification Act, does not include a retaliation ban. Such indisputable over-inclusiveness by later Congresses is not show evidence that the 1974 Congress omitted a retaliation ban from § 633a(a). *See Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839-40 & nn.14-15 (1988) (redundancy caused by subsequent amendment does not control scope of initial enactment); *Oneida Indian Nation* v. *County of Oneida, N.Y.*, 414 U.S. 661, 680-81 n.15 (1974) (duplicative provision simply made "assurance doubly sure").

still (who fall outside the CSRA) no remedy at all.[16] Vague invocations of "conflicting policy considerations," Br. 35 n.8, cannot possibly explain this utterly bizarre patch-work response to retaliation.

In particular, it does not explain why Congress would leave some covered employees completely remediless if they suffer retaliation. As the government itself has recognized, U.S. *Jackson* Br. 5, 13, and Congress's own actions make clear, Ptr. Br. 25, a remedy for retaliation is essential to ensure that a discrimination ban is effective. Clearly, Congress balanced conflicting policy considerations by excluding some workers from the ADEA altogether, not by selectively denying some covered workers protection from retaliation.

D. Agency Interpretations Confirm That § 633a(a) Bars Retaliation.

Consistent and authoritative agency interpretations confirm that § 633a(a) bars retaliation. The revised antidiscrimination regulations implementing the 1972 amendments to Title VII provided that an allegation of reprisal could be "reviewed as an individual complaint of discrimination," 37 Fed. Reg. at 22,723 (§ 713.262(a)), and the CSC extended these regulations to age discrimination after passage of

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[16] Most postal workers fall into this last category. *See* NTEU Br. 23-24. The government tries to plug this gap by noting that many are covered by collective bargaining agreements, and all are covered by the *Postal Service Manual*. Br. 36-37. As petitioner has explained, however, these alternatives provide only the most limited forms of protection from retaliation. Ptr. Br. 28 n.6; *see also* NTEU Br. 23-24. Moreover, as the NTEU has explained, there are thousands of other federal employees who have no protection against age-based retaliation under any alternative administrative scheme or collective bargaining agreement. NTEU Br. 21-23.

§ 633a(a). 39 Fed. Reg. 24,351 (July 2, 1974). This language is not merely procedural and does not treat discrimination and retaliation as "distinct." Br. 41-42. The CSC did not provide that reprisal claims were to processed in "accordance with the procedures governing" discrimination claims. Instead, it provided that they were to be reviewed *as* complaints of discrimination.

This is confirmed by the substance of the regulations themselves. As just explained, the 1972 revised antidiscrimination regulations were adopted "to implement" Title VII itself. They went beyond the existing—and largely unenforceable—"assurance" against reprisals, and authorized complaints about, and remedies for, all forms of retaliation triggered by complaints of then-unlawful discrimination, not merely the rare reprisals that constituted "adverse actions." The CSC thus necessarily determined that Title VII (and later § 633a(a)) barred retaliation as a form of proscribed discrimination. And, the remedies set forth in these regulations drew no distinctions between charges of discrimination and retaliation. See 5 C.F.R. § 713.271 (1973).

The current EEOC regulations are clear on this point. They do more than merely state a "[g]eneral policy" barring retaliation against persons "for opposing any practice made unlawful by" various statutes, including § 633a(a), 29 C.F.R. § 1614.101(b). They also state that "[c]omplaints alleging retaliation *prohibited by these statutes* are considered *to be* complaints of discrimination for purposes of this part," *id.* § 1614.103(a) (emphases added). The government ignores the first half of the latter provision, which does purport to construe § 633a(a). Moreover, this provision is not merely procedural ("this part" refers to federal-sector discrimination generally, not the pro-

cedures for handling complaints), and plainly deems retaliation "to be" a form of prohibited discrimination. Indeed, the government's arguments to this Court are flatly contradicted by its position in *Villescas* v. *Abraham*, 311 F.3d 1253 (10th Cir. 2002), where it accepted that § 633a(a) bars retaliation "pursuant to regulations issued by the EEOC." *Id.* at 1258.

E. Sovereign Immunity Provides No Basis For Concluding That § 633a(a) Fails To Prohibit Retaliation.

Finally, sovereign immunity principles are inapplicable to the statutory construction issue here. And even if they applied, the plain language and historical derivation of § 633a(a) show that Congress clearly prohibited retaliation triggered by a complaint of age discrimination.

Contrary to the government's claim, subsections (a) and (c) of § 633a do not jointly define the scope of the government's waiver. Br. 44-45. Subsection (a) sets forth a substantive norm, while subsection (c) waives immunity "for such legal or equitable relief as will effectuate the purposes of the ADEA. 29 U.S.C. § 633a(c). Rules of strict construction apply to subsection (c), and require courts to decide whether certain types of relief (*e.g.*, damages for emotional distress) are appropriate to redress violations of the statute's substantive norm (*i.e.*, that such legal relief "will effectuate the purposes" of the Act). But those rules do not apply to and limit the statute's substantive norm itself, which is found in subsection (a). Indeed, the government recognized this very distinction in *Villescas*, where it accepted that a covered federal employee could bring a claim for retaliation, but argued that sovereign immunity barred the relief of compensatory damages for emotional distress. 311 F.3d at 1258.

This distinction, moreover, is confirmed by this Court's cases applying the Indian Tucker Act. Under that statute, the United States has consented to be sued for claims "arising under the Constitution, laws or treaties of the United States," 28 U.S.C. § 1505, and the "rights-creating source of substantive law" that gives rise to such claims is not subject to the rules of strict construction applicable to the waiver of sovereign immunity itself. See *United States* v. *Navajo Nation*, 537 U.S. 488, 503 (2003) ("rights-creating statute or regulation need not contain 'a second waiver of sovereign immunity'") (quoting *United States* v. *Mitchell*, 463 U.S. 206, 218-19 (1983)). Instead, the rights-creating statute is subject to a "'fair interpretation'" standard, which requires "a showing demonstrably lower than the standard for the initial waiver of sovereign immunity" itself. *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) So too here, Congress has waived immunity to a civil action brought by "[a]ny person aggrieved," 29 U.S.C. § 633a(c), and the "rights-creating source of substantive law" that determines whether a person is "aggrieved"—subsection (a)—is not subject to the rules of strict construction.

By contrast, the government argues that sovereign immunity principles entitle courts to decide for themselves whether the purposes of § 633a of the ADEA would be "effectuated" if its substantive prohibition encompasses retaliation. Br. 44. Tellingly, however, the government identifies no case in which this Court has used sovereign immunity principles to narrow a substantive norm based on such judicial policy-making. Certainly, *Lehman* is not such a case; it simply interpreted subsection (c) of § 633a, not sub-

section (a). 453 U.S. at 162-68.[17] Nor does the government dispute that the "double-narrowing" it seeks would render the EEOC's *Chevron*-style interpretive authority illusory and would require a more stringent construction of Title VII's analogous discrimination ban than the ineffective regulatory ban Congress sought to replace. Ptr. Br. 50-51. These unexplained anomalies confirm that it is improper to narrow substantive norms based on sovereign immunity concerns.

In all events, § 633a(a) contains the necessary clear statement. As petitioner has explained, *id.* at 47 & n.18, this Court stressed that the materially indistinguishable language of Title IX "clearly" prohibited retaliation and thus satisfied an equally stringent clear statement rule. Indeed, the language of § 633a(a) is even broader in scope than Title IX's, and the clarity of its prohibition against retaliation is compelled by its derivation from Title VII's federal-sector discrimination ban and the proximity of its enactment to *Sullivan*, both of which make clear that the 1974 Congress would have plainly understood the phrase "discrimination based on age" to include a ban on retalia-

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[17] Similarly, *United States* v. *Mitchell*, 445 U.S. 535 (1980), is part of the line of cases that established the "fair interpretation" standard for rights-creating statutes that give rise to claims under the Indian Tucker Act. *See White Mountain Apache Tribe*, 537 U.S. at 472-73. *Lane* v. *Pena*, 518 U.S. 187 (1996), held that the Rehabilitation Act does not waive immunity for monetary damages. *Id.* at 192-94. In *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992), the Court held that a provision of the bankruptcy code waives immunity for declaratory and injunctive relief but not for money damages. *Id.* at 34-37. And in *Irwin* v. *Department of Veteran Affairs*, 498 U.S. 89, 94-96 (1990), the Court interpreted § 717(c) of Title VII, not its substantive prohibition, § 717(a), in determining that equitable tolling applies in Title VII suits brought against the federal government.

tion. The government's attempt to create ambiguity based on inapposite comparisons to other provisions or speculation about Congress's intent cannot show otherwise.

CONCLUSION

For the foregoing reasons, and those stated in the opening brief, the judgment of the First Circuit should be reversed.

Respectfully submitted,

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